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WATER RIGHTS COMPACT

STATE OF MONTANA

UNITED STATES OF AMERICA, NATIONAL PARK SERVICE

This Compact is entered into by the State of Montana and the United States of America to settle for all time any and all claims to water for certain lands administered by the National Park Service within the State of Montana at the time of the effective date of this Compact.

A Compact between the State of Montana and the United States of America regarding water rights for National Park Service lands was executed January 31, 1994. The parties were unable to finalize agreement on quantification of the water rights for Bighorn Canyon National Recreation Area and the Little Bighorn Battlefield National Monument prior to the completion of the Compact executed January 31, 1994. This Compact is the final agreement regarding the water rights attributable to these two NPS Units.

RECITALS

WHEREAS, in 1979 the United States filed in the United States District Court for the District of Montana several actions to adjudicate, inter alia, its rights to water with respect to Glacier National Park, see United States v. Aageson, No. CV-79-21-GF; United States v. Abell, No. CV-79-33-M; and United States v. AMS Ranch, Inc., No. CV-79-22-GF.

WHEREAS, the State of Montana, in 1979 pursuant to Title 85, Chapter 2 of the Montana Code Annotated, commenced a general adjudication of the rights to the use of water within the State of Montana including all federal reserved and appropriative water rights;

WHEREAS, 85-2-703, MCA, provides that the state may negotiate settlement of claims by the federal government to non-Indian reserved waters within the State of Montana;

WHEREAS, the United States wishes to quantify and have decreed the amount of water necessary to fulfill the purposes of the existing National Park Service units in the State of Montana;

WHEREAS, the United States, in quantifying its reserved water rights recognizes the need to accommodate the interests of the state and its citizens by providing for the development and use of water in the vicinity of the Park units to the extent that it is possible to do so without materially affecting the rights and interests of the United States;

1 WHEREAS, the United States Attorney General, or a duly designated
2 official of the United States Department of Justice, has
3 authority to execute this Compact on behalf of the United States
4 pursuant to the authority to settle litigation contained in 28
5 U.S.C. §§ 516-17 (1968);

6
7 WHEREAS The Secretary of the Interior, or a duly designated
8 official of the United States Department of the Interior, has
9 authority to execute this Compact on behalf of the United States
10 Department of Interior pursuant to 43 U.S.C. § 1457 (1986, Supp.
11 1992);

12
13 NOW THEREFORE, the State of Montana and the United States agree
14 as follows:

15
16 ARTICLE I
17 DEFINITIONS

18
19 For purposes of this Compact only, the following definitions
20 shall apply:

21
22 (1) "Abstract" means the copy of the document entitled "Abstract
23 of National Park Service Water Rights - BCNRA and LBBNM"
24 referenced in this compact as Appendix 2.

25
26 (2) "Bighorn Canyon National Recreation Area" or "BCNRA" means
27 those lands located in Montana that were acquired pursuant to, or
28 designated as such by Act of October 15, 1966, 80 Stat. 913.

29
30 (3) "Bureau" means the Montana Bureau of Mines and Geology or
31 its successor.

32
33 (4) "Category 1 stream" means a stream that headwaters on the
34 reserved land administered by the National Park Service.

35
36 (5) "Category 1a stream" means a stream that headwaters on the
37 reserved land administered by the National Park Service and
38 which, in part, carries water that drains non-federal land within
39 the boundaries of the same reserved land.

40
41 (6) "Category 3 stream" means a stream that headwaters in
42 Montana outside the reserved land administered by the National
43 Park Service that flows into the reserved land and is the source
44 for consumptive use water rights recognized under state law on
45 the effective date of this Compact.

46
47 (7) "Category 4 stream" means a stream that is treated
48 individually due to special circumstances.

49
50 (8) "Consumptive use" means use of surface water not considered
51 a non-consumptive use under (18) and use of groundwater which is

1 shown to be hydrologically connected to surface water pursuant to
2 Article II.

3
4 (a) "Current consumptive use", when referring to water rights
5 recognized under state law only, means all consumptive use water
6 rights recognized under state law with a priority date on or
7 before the effective date of the compact.

8
9 (b) "Future consumptive use", when referring to a water right
10 recognized under state law only, means a consumptive use water
11 right recognized under state law with a priority date after the
12 effective date of the compact.

13
14 (9) "Credible information" means credible evidence sufficient to
15 support a prima facie basis for the theory asserted.

16
17 (10) "Crow Tribal Water Rights" means those senior reserved
18 water rights and any aboriginal water rights held by the United
19 States in trust for the Crow Tribe which are being quantified as
20 part of the general adjudication of water rights in Montana.

21
22 (11) "Curtailment" means action pursuant to this Compact to
23 reduce or shut-off diversions by a junior water user to satisfy
24 the senior instream flow right of the National Park Service.

25
26 (12) "Department" means the Montana Department of Natural
27 Resources and Conservation or its successor.

28
29 (13) "Effective date of this Compact" means the date of the
30 ratification of the Compact by the Montana legislature, written
31 approval by the United States Department of the Interior, or
32 written approval by the United States Department of Justice,
33 whichever is later.

34
35 (14) "Groundwater" means water that is beneath the ground
36 surface.

37
38 (15) "Hydrologically connected", for the purposes of Articles II
39 and III, means groundwater that is connected to surface water
40 such that appropriation at the proposed rate will cause a
41 calculable reduction in surface water flow. A "calculable
42 reduction in surface water flow" means a theoretical reduction
43 based on credible information as opposed to a measured reduction.

44
45 (16) "Instream flow" means the water that the parties agree
46 shall remain in the stream in satisfaction of the United States'
47 reserved water right for the purposes of the reserved land.

48
49 (17) "Little Bighorn Battlefield National Monument" or "LBBNM"
50 means those lands located in Montana that were acquired pursuant

1 to or withdrawn and reserved by Presidential Proclamation of
2 December 7, 1886, and by Act of March 22, 1946, 60 Stat. 59.

3
4 (18)(a) "Non-consumptive use" when applied to a mining or
5 hydropower use for which a water right is recognized under state
6 law with a priority date after the effective date of this
7 compact, means an appropriation that does not cause a net loss in
8 the surface source of supply, and where substantially all of the
9 diverted water becomes return flow with little or no delay
10 between the time of diversion and the time of return, and without
11 adverse effect on the quantity or quality of water necessary to
12 fulfill the purposes of the reserved land.

13
14 (b) "Non-consumptive use" when applied to a water right
15 recognized under state law other than a mining or hydropower use
16 with a priority date after the effective date of this compact, or
17 a water right recognized under state law with a priority date on
18 or before the effective date of this compact, means a water right
19 considered to be non-consumptive by the decree, permit or law
20 authorizing the use.

21
22 (19) "Parkman Sandstone" means the unit as defined in Moulder,
23 E.A., Klug, M.F., Morris, D.A., and Swenson, F.A. (1960) "Geology
24 and Ground-Water Resources of the Lower Little Bighorn River
25 Valley Big Horn County, Montana," USGS Water Supply Paper 1487,
26 where it occurs along the Little Bighorn River and its
27 tributaries between the Montana-Wyoming line and the Little
28 Bighorn Battlefield National Monument.

29
30 (20) "Parties" means the State of Montana and the United States.

31
32 (21) "Person" means an individual, association, partnership,
33 corporation, state agency, political subdivision, or any other
34 entity, but does not include the United States.

35
36 (22) "Quaternary Alluvium" means the unit as defined in Moulder,
37 E.A., Klug, M.F., Morris, D.A., and Swenson, F.A. (1960) "Geology
38 and Ground-Water Resources of the Lower Little Bighorn River
39 Valley Big Horn County, Montana," USGS Water Supply Paper 1487,
40 where it occurs along the Little Bighorn River and its
41 tributaries between the Montana-Wyoming line and the Little
42 Bighorn Battlefield National Monument.

43
44 (23) "Quaternary Terrace Deposits" means the unit as defined in
45 Moulder, E.A., Klug, M.F., Morris, D.A., and Swenson, F.A. (1960)
46 "Geology and Ground-Water Resources of the Lower Little Bighorn
47 River Valley Big Horn County, Montana," USGS Water Supply Paper
48 1487, where it occurs along the Little Bighorn River and its
49 tributaries between the Montana-Wyoming line and the Little
50 Bighorn Battlefield National Monument.
51

1 (24) "Recognized under state law" when referring to a water right
2 or use means a water right or use protected by state law, but
3 does not include state recognition of a federal or tribal
4 reserved water right.

5
6 (25) "Return flow" means the portion of water diverted from a
7 source that is returned to the same source, at or near the point
8 of diversion.

9
10 (26) "State" means the State of Montana and all officers, agents,
11 departments, and political subdivisions thereof. Unless
12 otherwise indicated, for purposes of notification or consent,
13 "state" means the Director of the Montana Department of Natural
14 Resources and Conservation or his or her designee.

15
16 (27) "Tributary to" means surface water that originates in the
17 same hydrologic basin or subbasin as the stream referred to and
18 which contributes water to the same stream.

19
20 (28) "United States" means the federal government and all
21 officers, agencies, departments and political subdivisions
22 thereof. Unless otherwise indicated, for purposes of
23 notification or consent other than service in litigation, "United
24 States" means the Secretary of the Department of the Interior, or
25 his or her designees.

26
27 ARTICLE II
28 IMPLEMENTATION
29

30 A. Abstract:

31
32 Concurrent with this Compact, the parties prepared an Abstract, a
33 copy of which is referenced as Appendix 2, which is a specific
34 listing of all of the United States' water rights for Bighorn
35 Canyon National Recreation Area and the Little Bighorn
36 Battlefield National Monument that are described in this Compact
37 and quantified in accordance with this Compact. The parties
38 prepared the Abstract to comply with the requirements for a final
39 decree as set forth in 85-2-234(4) and (7), MCA, and in an effort
40 to assist the state courts in the process of entering decrees
41 accurately and comprehensively reflecting the rights described in
42 this Compact. The rights specified in the Abstract are subject
43 to the terms of the Compact. In the event of a discrepancy
44 between a right listed in the Abstract and that same right as
45 quantified in accordance with Articles II and III of the Compact,
46 the parties intend that the quantification in accordance with
47 Articles II and III of this Compact shall be reflected in a final
48 decree.
49

1 B. Method of Allocation of Water on Category 3 and 4 Streams and
2 of Determining Rights Subject to Curtailment on the Little
3 Bighorn River and its Tributaries:
4

5 This section explains the method of quantification of the
6 reserved instream flow water rights of the United States for
7 Category 3 and 4 streams and the method of calculating the
8 quantity of consumptive use pursuant to state law within a basin
9 to which the United States agrees to subordinate its reserved
10 instream flow water rights. The method set forth in this section
11 shall be used to determine whether the limits on consumptive use
12 pursuant to state law set forth in Article III have been reached
13 and whether a water right on the Little Bighorn River and its
14 tributaries upstream from the LBBNM shall be subject to
15 curtailment to satisfy the reserved instream flow water right for
16 LBBNM. Addition to the Abstract of a reserved instream flow
17 water right on a stream inadvertently omitted by the parties or
18 reclassification of a stream due to a water right recognized
19 under state law and inadvertently omitted by the parties shall be
20 consistent with this section and shall not be deemed a
21 modification of this Compact.
22

23 1. Allocation to Instream Flow:
24

25 With the exception of the reserved instream flow rights for
26 LBBNM, the allocation of water to instream flow on Category 3 and
27 4 streams is arrived at using the following method as explained
28 in general terms:
29

30 a. The United States' reserved water right for instream flow
31 includes the entire flow of that stream within the State of
32 Montana at the point where the stream flows over or forms the
33 boundary of the specified reserved land after: (1) all
34 consumptive use water rights of any agency of the United States
35 recognized under federal or state law are satisfied; and (2)
36 subordination of the reserved water right for instream flow to
37 water rights recognized under state law as set forth in and
38 limited by Article III and more specifically in the Abstract.
39

40 b. Actual use of water in Wyoming shall not diminish the
41 quantity of water designated for consumptive use pursuant to
42 state law as set forth in Article III.
43

44 2. Method of Calculation of Consumptive Use Rights Recognized
45 Under State Law:
46

47 To determine whether water is available for appropriation for
48 consumptive use pursuant to state law on Category 3 and 4
49 streams, and for determining whether the limit on subordination
50 of the United States' water rights to consumptive uses has been
51 reached, the following provisions shall apply:

1 a. Tributary Water: The calculation of total consumptive use on
2 a Category 3 or 4 stream shall include all current and future
3 consumptive use, recognized under state law, of surface water
4 tributary to the stream to the point it enters the reserved land.
5 The limits on total consumptive use on a Category 4 stream that
6 forms the boundary of the reserved land shall include all current
7 and future consumptive use recognized under state law, of surface
8 water tributary to the stream to the most downstream point that
9 the stream forms the boundary of the reserved land.

10
11 b. Groundwater:

12
13 The following sections i. and ii., shall apply to BCNRA. The
14 following sections i., and iii., shall apply to LBBNM.

15
16 i. Within 2 years after the effective date of this Compact, the
17 Department, in consultation with the United States, is directed
18 to promulgate rules as may be necessary to implement Article II,
19 section B.2.b. Said rules shall not alter the rights or
20 obligations of the parties hereto.

21
22 ii. The calculation of total future consumptive use on Category 3
23 or 4 streams at BCNRA shall include appropriations of groundwater
24 as follows:

25
26 (1) The calculation of total future consumptive use shall not
27 include appropriation of groundwater by means of a well or
28 developed spring with an appropriation of 35 gallons per minute
29 (gpm) or less that does not exceed 10 acre feet per year (afy).

30
31 (2) The limit on total consumptive use shall not include an
32 appropriation of groundwater by means of a well or developed
33 spring with a permit amount in excess of 35 gpm or with a volume
34 of use greater than 10 afy, including a combined appropriation
35 from the same source from two or more wells or developed springs
36 that exceeds these limitations, unless the United States shows by
37 a preponderance of the evidence that the proposed appropriation
38 is hydrologically connected to surface water tributary to the
39 reserved portion of a Category 3 or 4 stream. If the United
40 States meets this burden, the Department shall include the
41 appropriation in the calculation of total consumptive use.

42
43 (a) The Department shall provide notice of the proposed
44 appropriation to the United States concurrent with notice
45 pursuant to 85-2-307, MCA.

46
47 (b) Within 60 days of the mailing of notice, the United States
48 may file an objection to the proposed appropriation on the basis
49 that it is hydrologically connected to surface water.
50

1 (c) If the proposed appropriation is determined not to be
2 hydrologically connected to surface water, or if the limit on
3 consumptive use has not been reached, the Department may issue a
4 permit in accordance with state law and the applicant may
5 complete the appropriation.
6

7 iii. Determination of whether an appropriation of groundwater
8 after the effective date of the this Compact shall be subject to
9 a curtailment to satisfy the instream flow water right at LBBNM
10 shall be made as follows:
11

12 (1) Groundwater appropriations subject to curtailment shall not
13 include an appropriation of groundwater for stock or domestic
14 purposes by means of a well or developed spring with an
15 appropriation of 35 gpm or less that does not exceed 10 afy.
16

17 (2) Groundwater appropriations subject to curtailment to satisfy
18 the 51 cfs instream flow water rights for LBBNM shall not include
19 an appropriation of groundwater by means of a well or developed
20 spring with a permit amount in excess of 35 gpm or with a volume
21 of use greater than 10 afy, including a combined appropriation
22 from the same source from two or more wells or developed springs
23 that exceeds these limitations, unless the United States shows by
24 a preponderance of the evidence that the proposed appropriation
25 is hydrologically connected to the Little Bighorn River or its
26 tributaries upstream from LBBNM.
27

28 (a) The Department shall provide notice of the proposed
29 appropriation to the United States concurrent with notice
30 pursuant to 85-2-307, MCA.
31

32 (b) Within 60 days of the mailing of notice, the United States
33 may file an objection to the proposed appropriation on the basis
34 that it is hydrologically connected to surface water.
35

36 (c) If the proposed appropriation is determined not to be
37 hydrologically connected to surface water the Department may
38 issue a permit in accordance with state law and the applicant may
39 complete the appropriation.
40

41 (d) If the proposed appropriation is determined to be
42 hydrologically connected to surface water the Department may
43 issue the permit in accordance with state law with notice that
44 the appropriation is subject to curtailment to satisfy the
45 instream flow water right of the LBBNM and the applicant may
46 complete the appropriation.
47

48 (3) Groundwater appropriations subject to curtailment to satisfy
49 the 950 cfs instream flow water rights for LBBNM shall not
50 include an appropriation of groundwater by means of a well or
51 developed spring with a permit amount in excess of 35 gpm or with

1 a volume of use greater than 10 afy, including a combined
2 appropriation from the same source from two or more wells or
3 developed springs that exceeds these limitations, unless the
4 United States shows by a preponderance of the evidence that the
5 proposed appropriation is hydrologically connected to the Little
6 Bighorn River or its tributaries upstream from LBBNM and the
7 appropriation is completed in the Quaternary Alluvium, Quaternary
8 Terrace Deposits, or the Parkman Sandstone.

9
10 (a) The Department shall provide notice of the proposed
11 appropriation to the United States concurrent with notice
12 pursuant to 85-2-307, MCA.

13
14 (b) Within 60 days of the mailing of notice, the United States
15 may file an objection to the proposed appropriation on the basis
16 that it is hydrologically connected to surface water and the
17 proposed appropriation is to be completed in the Quaternary
18 Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone.

19
20 (c) If the proposed appropriation is determined not to be
21 hydrologically connected to surface water or not to be completed
22 in the Quaternary Alluvium, Quaternary Terrace Deposits, or the
23 Parkman Sandstone the Department may issue a permit in accordance
24 with state law and the applicant may complete the appropriation.

25
26 (d) If the proposed appropriation is determined to be
27 hydrologically connected to surface water and to be completed in
28 the Quaternary Alluvium, Quaternary Terrace Deposits, or the
29 Parkman Sandstone the Department may issue the permit in
30 accordance with state law with notice that the appropriation is
31 subject to curtailment to satisfy the instream flow water right
32 of the LBBNM and the applicant may complete the appropriation.

33
34 c. Abandonment: When a consumptive use right recognized under
35 state law on a Category 3 or 4 stream is abandoned and such
36 abandonment causes water to become available for appropriation
37 within the limits of the total amounts of water allocated to
38 consumptive use rights recognized under state law established for
39 that stream by Article III, the increment of water below that
40 limit is available for new appropriation in accordance with state
41 law and this Compact. State law governs the issue of whether an
42 abandonment has occurred.

43
44 d. Non-Consumptive Use: The limit on total consumptive use
45 rights recognized under state law shall not include
46 non-consumptive uses as defined by this Compact.

47
48 C. Subordination of Instream Flow Right:

49
50 1. The United States agrees to subordinate its reserved water
51 right for instream flow to consumptive uses calculated according

1 to this Article in a manner that is specific to each stream on
2 which a reserved water right is described. This subordination is
3 set forth for each stream in Article III. Curtailment of uses to
4 which the reserved water rights described in this Compact have
5 not been subordinated during periods of low flow shall proceed on
6 the basis of priority and may be initiated in a state or federal
7 court of competent jurisdiction pursuant to Article II, sections
8 I and K.
9

10 2. The reserved water rights described in this Compact shall
11 not be subordinate to water rights which were forfeited by §
12 85-2-212 as interpreted in In the Matter of the Adjudication of
13 the Water Rights within the Yellowstone River, 253 Mont. 167, 832
14 P.2d 1210 (1992), nor shall any claimant of such forfeited water
15 right have standing, based solely on such claimed right, to
16 object to this Compact or any reserved water right described in
17 this Compact, provided that water allocated to future consumptive
18 use pursuant to Article III of this Compact may be used to
19 satisfy claims filed pursuant to 85-2-221(3), MCA in order of
20 priority.
21

22 D. Location of Instream Flow Rights: The United States'
23 reserved water rights for instream flow apply to the portion of
24 the Categories 1 through 4 streams specified in this Compact that
25 flow over or form the boundary to reserved land administered by
26 the National Park Service.
27

28 E. Change in Instream Flow Right: Except as provided in Article
29 II, section J.2.b., the water rights dedicated to instream flow
30 by this Compact shall not be changed to any other use.
31

32 F. Prohibition on Future Impoundments: No new impoundments may
33 be permitted on the mainstem of the Little Bighorn River in
34 Montana upstream of the LBBNM after the effective date of this
35 Compact. This prohibition shall include impoundments that are
36 exempt from permit requirements under state law. Reclamation,
37 repair or rehabilitation of an existing impoundment shall not be
38 considered a new impoundment, provided that without the consent
39 of the United States, reclamation, repair or rehabilitation shall
40 not cause the impoundment to exceed the original constructed
41 capacity of the impoundment. This prohibition shall not apply to
42 impoundments constructed to store a senior Tribal water right or
43 to implement settlement of litigation regarding quantification of
44 a Tribal water right.
45

46 G. Management to Maximize Use by Montana Water Users of the
47 Water Allocated to Consumptive Use Rights Recognized Under State
48 Law: If any type of conservation or water distribution plan
49 which includes measurement of actual water use, including use
50 pursuant to rights recognized under state law with a priority
51 date before the effective date of this compact, is adopted

1 pursuant to state law, the limits established for consumptive use
2 appropriated pursuant to state law shall apply to actual measured
3 use, not permitted and decreed or claimed rights, provided that
4 records of actual use be made available to the United States on
5 request and provided further that, such plan shall not diminish
6 the reserved water right of the United States as described in
7 this Compact.

8
9 H. Basin Closure

10
11 1. Except as provided in Article II, section B.2.c., in the
12 following drainage basins upstream of the portion of the stream
13 for which a reserved water right for instream flow is described
14 in this Compact, the Department shall not process or grant an
15 application or registration for a permit to appropriate or to
16 reserve water for future consumptive use as defined by this
17 Compact once the limits on consumptive use tabulated in Article
18 III and set forth more specifically in the Abstract are reached:
19

20 Big Horn Canyon National Recreation Area:

21 Dry Head, Deadman, Davis and Layout Creeks

22
23
24 2. If a temporary or permanent basin closure is enacted under
25 state law for a drainage basin or subbasin for which future
26 consumptive water use is limited under this Compact, the most
27 restrictive measures applicable to consumptive use of surface or
28 groundwater shall control.
29

30 I. Enforcement of Water Right

31
32 1. The United States, the state, or the holder of a water right
33 recognized under state law, may petition a state or federal court
34 of competent jurisdiction for relief when a controversy arises
35 between the United States' reserved water right described by this
36 Compact, and a holder of a water right recognized under state
37 law. Resolution of the controversy shall be governed by the
38 terms of this Compact where applicable, or to the extent not
39 applicable, by applicable state or federal law.
40

41 2. The United States agrees that a water commissioner appointed
42 by a state or federal court of competent jurisdiction, or other
43 official authorized by future changes in law, may enter a federal
44 reservation for which a water right is described in this Compact
45 for the purpose of data collection, including the collection of
46 information necessary for water distribution on or off the
47 federal reservation, and to inspect structures for the diversion
48 and measurement of water described in this Compact for
49 consumptive use and for the measurement of instream flow. The
50 terms of entry shall be as specified in an order of a state or
51 federal court of competent jurisdiction.

1 3. The Department or the Bureau may enter a federal enclave for
2 which a reserved water right is described in this Compact, at a
3 reasonable hour of the day, for the purposes of data collection
4 on water diversion and stream flow or inspection of devices
5 maintained by the United States pursuant to this Compact. The
6 Department or Bureau shall notify the United States by certified
7 mail or in person, at least 24 hours prior to entry.
8

9 4. The United States may request an investigation by the
10 Department of a diversion located upstream of the reserved
11 portion of a stream for which a reserved water right is described
12 in this Compact. The Department may investigate. If an
13 investigation occurs, the United States may accompany the
14 Department.
15

16 5. The United States shall maintain structures, including
17 wellhead equipment and casing, for the diversion and measurement
18 of water authorized for consumptive use by this Compact. The
19 United States shall maintain the devices it deems necessary for
20 enforcement of its reserved water right for instream flow
21 described in this Compact. The United States shall install and
22 maintain a rated gauge to measure instream flows in the Little
23 Bighorn River. The gauge on the Little Bighorn River shall be on
24 the reach of the river which forms the boundary of the LBBNM, the
25 exact location of which shall be at the discretion of the NPS.
26 The NPS shall resurvey the channel cross section as necessary to
27 maintain gauge accuracy, but in any event not less frequently
28 than every three (3) years. The United States may not seek
29 curtailment of junior water uses unless the channel has been
30 resurveyed within three (3) years of the date on which
31 curtailment is sought.
32

33 6. A person who violates or refuses or neglects to comply with
34 the provisions of this Compact, an order of the Department
35 pursuant to this Compact, or an action by the Bureau pursuant to
36 this Compact is subject to the penalties provided by state law.
37

38 7. For any appeal to state court of an administrative decision
39 authorized by this Compact, venue shall be the First Judicial
40 District in Helena and the review shall be conducted according to
41 the procedures for judicial review of contested cases under the
42 Montana Administrative Procedures Act, Title 2, Chapter 4, of the
43 Montana Code Annotated.
44

45 8. In any contested case proceeding held under the Montana
46 Administrative Procedures Act, Title 2, Chapter 4, of the Montana
47 Code Annotated, pursuant to this Compact, the common law and
48 statutory rules of evidence shall apply only upon stipulation of
49 all parties to a proceeding.
50

51 J. Change in Use

1 1. Change in Use Defined: For the purpose of this Article, the
2 following actions affecting the use of a reserved water right for
3 consumptive use described in this Compact shall be considered a
4 change in use:

5
6 a. An action that alters type of use, place of use, point of
7 diversion, place or means of storage, period of use or point of
8 return flow that will:

9
10 i. increase the net depletion on a source; or

11
12 ii. adversely affect water quality at the point the reserved
13 water right ends; or

14
15 iii. result in a change in point of diversion or point of return
16 flow relative to a holder of a water right recognized under state
17 law; or

18
19 iv. change the point of diversion from groundwater to surface
20 water, or from surface to groundwater; or

21
22 v. in any other manner, adversely affects the reasonable
23 exercise of a water right that is recognized under state law.

24
25 b. The exercise of a reserved water right to future consumptive
26 use as authorized by this Compact shall not be considered a
27 change in use.

28
29 2. Instream flow: Reserved water rights specified in this
30 Compact for instream flow shall not be subject to change to any
31 other use, provided that:

32
33 a. the emergency use of water for fire suppression as provided
34 for in Article III.C. shall not be deemed a change or alteration
35 in use, or violation of a reserved water right for instream flow;
36 and

37
38 b. the United States may seek to appropriate water for a
39 consumptive use on a source for which no consumptive use is
40 described in this Compact by seeking a permit under state law for
41 consumptive use, provided that the water right granted shall not
42 be counted against the limits on allocation for state consumptive
43 use water rights imposed by this Compact. The water right so
44 acquired shall be administered in accordance with Article V,
45 section B.

46
47 3. Consumptive uses: The United States may take action
48 affecting the use of its consumptive use water rights provided
49 that (1) the action shall be in fulfillment of the purposes of
50 the reservation; (2) the total use shall not exceed the amount

described in this Compact; and (3) the action shall not adversely affect a water right that is recognized under state law.

4. Notice of intent to change use: At least 180 days prior to a change in use, the United States agrees to provide notice to the Department.

a. The notice shall contain the facts pertinent to the proposed change including, where applicable:

i. The location of a new point of diversion.

ii. The new source of water.

iii. The new means of diversion.

iv. If a well is involved, the depth and locations of the old and new well.

v. The new use and its impact on actual consumption and water quality.

vi. If the change includes storage, the location, period and capacity of the storage facility.

vii. An estimate of when the change will be effective.

viii. A map showing the existing system and the proposed change.

b. At least 120 days prior to the proposed change, the United States agrees to publish the notice required by Article II, section J.4.a. with a statement that within 60 days following publication or service of notice, relief may be sought in a state or federal court of competent jurisdiction, once in a newspaper of general circulation in the area of the source, and to serve the notice by first-class mail on interested and potentially affected persons as identified by the records of the Department, including:

i. an appropriator of water or applicant for or holder of a permit who, according to the records of the Department, may be affected by the proposed appropriation;

ii. a purchaser under contract for deed that, according to the records of the Department, may be affected by the proposed appropriation;

iii. any public agency that has reserved water in the source recognized under state law; and

1 iv. a federal agency or Tribe that claims a reserved water right
2 or other water rights in the source.

3
4 c. On request by the United States, the Department shall
5 provide the information contained in its records identifying any
6 person potentially affected by the proposed change. The United
7 States agrees to reimburse the Department for the expense of
8 providing this information.

9
10 d. In the event that future changes in state law establish a
11 method of notice of a proposed change in use to interested and
12 potentially affected persons other than by first-class mail, the
13 United States may alter the method of notification accordingly.

14
15 e. Prior to the actual change, the United States agrees to
16 provide the Department with proof of notice by affidavit.

17
18 5. Objection to proposed change: Within 60 days following the
19 notice pursuant to Article II, section J.4.b., the Department or
20 any other person may bring an action against the proposed change
21 in use in a state or federal court of competent jurisdiction, if
22 a property right, water right, or other interest protected under
23 state law would be adversely affected, or if the proposed change
24 is not in compliance with this Compact.

25
26 6. Notice of Change:

27
28 a. The United States agrees to notify the state and provide a
29 copy of the final order within 60 days of its entry by a state or
30 federal court of competent jurisdiction resolving any objections
31 to the change in use of a federal reserved water right described
32 in this Compact.

33
34 b. The United States agrees to provide the state with notice of
35 completion of the change within 60 days after the completion.

36
37 7. Reporting by the United States: For any action affecting
38 the use of a consumptive right whether or not such action is
39 deemed a change in use, the United States agrees to provide the
40 following information to the Department:

41
42 a. Well log: For a use that includes the drilling of a well or
43 enlargement of an existing wellbore, the United States agrees to
44 provide a well log to the state within 60 days of the completion
45 of the well.

46
47 b. Emergency Use: Within 60 days after the commencement of a
48 temporary emergency use for fire suppression described in Section
49 III.C. of this Compact, the United States agrees to notify the
50 state of the use to which the water was put, the dates of use,
51 and the estimated amount of water used.

1 c. Annual Report: Between April 1 and May 1 of each year, the
2 United States agrees to provide the Department with a report on
3 (1) actions during the preceding year affecting the use of a
4 consumptive use right described in this Compact, regardless of
5 whether the action is deemed a change in use pursuant to Article
6 II, section J.1.; (2) the initiation of new uses that were
7 completed during the preceding year; and (3) any data and
8 documents generated or received by the National Park Service
9 during the preceding year on measurement of instream flow on a
10 Category 3 or 4 stream.
11

12 8. Reporting by the State: Between December 1 and December 31
13 of each year, the Department shall provide the United States with
14 a report of: (1) changes in use during the preceding year, as
15 defined by state law, of water rights upstream of or within the
16 boundaries of reserved land for which a reserved water right is
17 described in this Compact; (2) new permits issued during the
18 preceding year according to the records of the Department; and
19 (3) any data and documents generated by the Department during the
20 preceding year on the measurement of streamflows, diversions and
21 well use on or tributary to Category 3 or 4 streams.
22

23 K. Administration of Little Bighorn Instream Flow
24

25 This section governs the administration of instream flow rights
26 of the United States on the Little Bighorn River described in
27 Article III. section B.3., in relation to junior water rights
28 initiated after the effective date of this Compact to which the
29 United States has not subordinated and which are not a part of
30 the Crow Tribal Water Rights. Nothing in these provisions, or in
31 this Compact, regarding administration affects or in any way
32 impairs any ability or authority of the Crow Tribe to administer,
33 regulate or manage any water rights within the boundaries of the
34 Crow Indian Reservation.
35

36 1. For purposes of administering the instream flow water right
37 of the United States described in Article III. section B. 3. the
38 United States shall establish and maintain a discharge gauge at
39 the LBBNM gauge site. The United States shall keep a record of
40 daily flows for the period from March 1 through June 30 of each
41 year in which the United States seeks curtailment of junior water
42 rights.
43

44 2. The United States may seek curtailment to enforce its 950
45 cfs instream flow water right, described in Article III. section
46 B.3.b., at the LBBNM gauge site any time from May 1 through June
47 30. The decision to seek curtailment shall be initiated by the
48 NPS and at the NPS's discretion.
49

50 a. A decision to seek curtailment to enforce the 950 cfs
51 instream flow water right shall be based on a determination that

1 the flow at the LBBNM gauge site plus claimed or permitted
2 appropriations by non-subordinated junior water users equals 950
3 cfs or more.

4
5 b. Once curtailment is sought and confirmed as set forth in
6 Article II. section K.3, it may last for up to 15 consecutive
7 days, or through June 30, whichever occurs first, provided,
8 however, that the 15 days shall be reduced by subtracting the
9 number of days between March 1st and the date of confirmation of
10 curtailment that the flow at the LBBNM gauge site has equalled or
11 exceeded 950 cfs

12
13 c. Any curtailment based upon the 950 cfs water right shall be
14 limited to direct surface diversions from the Little Bighorn
15 River and its tributaries, and wells completed in the Quaternary
16 Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone,
17 as described in Article II. section B.2.b.iii.(3).

18
19 3. Notice by NPS that it seeks curtailment to enforce the 950
20 cfs instream flow water right shall be by either written or
21 verbal notice to the appropriate DNRC office. The NPS shall use
22 its best efforts to maintain contact with the DNRC beginning May
23 1st of each year to provide advance warning of stream flow
24 conditions.

25
26 a. Upon receipt of notice from the NPS that the United States
27 requests curtailment to enforce the 950 cfs instream flow water
28 right, the DNRC shall, within 24 hours, verify actual diversions
29 by non-subordinated junior water users and confirm that the sum
30 of flow at the LBBNM and actual diversions by non-subordinated
31 junior water users equals or exceeds 950 cfs. If the DNRC
32 determines that the actual diversions are insufficient to bring
33 the flow at the LBBNM gauge site to 950 cfs, it shall not proceed
34 with curtailment. If a decision is made not to proceed with
35 curtailment, the DNRC shall notify the NPS the same day. After
36 notification, the NPS may again seek curtailment beginning the
37 following day if conditions of flow and time of year meet the
38 conditions set forth in Article II. section K.2.

39
40 b. If the DNRC proceeds with curtailment to enforce the 950 cfs
41 water right, the DNRC shall, without delay, shut off
42 non-subordinated junior water uses in reverse order of priority
43 to the extent necessary to bring the flow at the LBBNM gauge site
44 to 950 cfs, provided that, DNRC has the discretion to forgo
45 curtailment of a particular water right if it determines that
46 curtailment of that water right to satisfy the 950 cfs instream
47 flow right would be futile.

48
49 c. Should flow at the LBBNM gauge site exceed 950 cfs at any
50 time during curtailment, the DNRC may reopen diversions in order
51 of priority until 950 cfs is reached. Should the flow at the

1 LBBNM gauge site drop below 950 cfs at any time during the
2 curtailment, non-subordinated junior water uses shall remain shut
3 off provided that, if the NPS reasonably determines the flow at
4 the LBBNM gauge site is not likely to come back up to 950 cfs
5 during the remainder of the curtailment period, it may consent to
6 end the curtailment.
7

8 4. Notice by NPS that it seeks curtailment to enforce the 51
9 cfs instream flow water right described in Article III. section
10 B.3.a., shall be by either written or verbal notice to the
11 appropriate DNRC office. Upon receipt of notice from the NPS
12 that the United States requests a curtailment to enforce the 51
13 cfs instream flow water right, the DNRC shall, within 24 hours,
14 verify actual diversions by non-subordinated junior water users.
15 If diversions are being made by non-subordinated junior water
16 users, the DNRC shall, without delay, shut off non-subordinated
17 junior water uses in order of priority to the extent necessary to
18 bring the flow at the LBBNM gauge site to 51 cfs, provided that,
19 DNRC has the discretion to forgo curtailment of a particular
20 water right if it determines that curtailment of that water right
21 to satisfy the 51 cfs instream flow right would be futile.
22

23 5. All permits within the Little Bighorn River Basin upstream
24 of the LBBNM gauge site with a priority date after the effective
25 date of this Compact shall be conditioned on the prior right of
26 the NPS for 950 cfs instream flow water right at the LBBNM during
27 May and June, and for the 51 cfs instream flow water right during
28 any portion of the year, and on the authority of DNRC to curtail
29 use to satisfy the instream flow right.
30

31 6. All diversions from the Little Bighorn River or its
32 tributaries above LBBNM with a priority date after the effective
33 date of this Compact, shall have the duty to establish and
34 maintain a controllable headgate and an adequate measuring device
35 and shall also be required to maintain a record of daily water
36 diversions, including noting the number of hours for which
37 diversions are made for each day and the flow rate at which water
38 is diverted.
39

40 7. DNRC and NPS shall work together to develop a quantitative
41 prediction relationship between the flow at the LBBNM gauge site,
42 diversions by non-subordinated junior water users, and the
43 prediction of curtailment requirements.
44

45 8. Either party has the right to petition a court of competent
46 jurisdiction for administration of water rights or for
47 appointment of a water commissioner should cooperative
48 administration not be proceeding as planned or should cooperative
49 administration become burdensome. Any water commissioner shall
50 enforce the curtailment as described in this Compact. Exhaustion

1 of administrative remedies pursuant to this article is not a
2 prerequisite to any such suit.

3
4 ARTICLE III
5 WATER RIGHT
6

7 The parties agree that the following water rights are in
8 settlement of the reserved water rights of the United States for
9 the reservations described. The parties to this agreement
10 recognize that the water rights for these NPS Units are junior to
11 Crow Tribal Water Rights. All reserved water rights described in
12 this Article are subject to Article V, section A.
13

14 A. Bighorn Canyon National Recreation Area
15

16 1. Priority Date: The United States has a priority date of
17 October 15, 1966 for the water rights described in this Compact
18 for Bighorn Canyon National Recreation Area. The United States
19 recognizes that its water rights for the BCNRA are junior in
20 priority to Crow Tribal Water Rights.
21

22 2. Consumptive Use: The United States has water rights for
23 current and future consumptive use for the purposes of the
24 Bighorn Canyon National Recreation Area (BCNRA) as set forth in
25 the following Table. The period of use shall be from January 1
26 through December 31. The source and place of use shall be as set
27 forth more specifically in the Abstract.
28
29
30

31 -----
32 TABLE 1
33

34 United States National Park Service
35 Bighorn Canyon National Recreation Area Consumptive Use

36 Place of Use	37 Total 38 Volume 39 (ac-ft)	40 Maximum 41 Flow Rate 42 (gpm)
43 Fort Smith Visitor center	44 17.6	45 110
46 Ok-A Beh/Marina	47 6.9	48 35
49 Grapevine Creek Overflow Campground	50 12.5	51 110
Barry's Landing, Trail Creek, Chain Canyon	29.3	180
Bighorn River Ranch	4.7	35
Layout Creek Ranger Station, Sorenson Ranch	140.4	230
Lockhart Ranch	25.6	110
Hillsboro Site	11.0	230
Stock and Wildlife Watering	3.5	

1 Total Volume of Use:

251.5 acre-feet

3 -----
4
5
6 3. Instream Flow

7
8 The United States has water rights for instream flow in the
9 streams which flow over the land of Bighorn Canyon National
10 Recreation Area. These water rights for instream flow are
11 quantified and defined as follows:
12

13 a. Category 1a:

14
15 i. Identification: The following streams are designated as
16 "Category 1a": North Fork Trail Creek, South Fork Trail Creek,
17 and Trail Creek.
18

19 ii. Instream Flow: The United States has a water right for
20 instream flow on the Category 1a streams where they enter the
21 BCNRA in the amount of the entire flow of the streams, less (1)
22 any United States' consumptive use rights described in this
23 Compact and any Crow Tribal Water Rights; and (2) all water
24 rights appurtenant to nonfederal land within the boundaries of
25 BCNRA recognized under state law and having a priority date
26 before the effective date of this Compact.
27

28 In the event that all non-federal land on a Category 1a stream is
29 acquired by the United States for the purpose of addition to
30 BCNRA, the stream may be reclassified as a Category 1 stream at
31 the request of the United States.
32

33 b. Category 3:

34
35 i. Identification: The following streams are designated as
36 "Category 3": Dry Head Creek, Deadman Creek, Davis Creek (aka
37 Medicine Creek), and Layout Creek.
38

39 ii. The United States has a water right for instream flow on
40 Category 3 streams in the amount of the entire flow of the
41 streams, less any United States' consumptive use rights described
42 in this Compact, and any Crow Tribal Water Rights, provided that,
43 the instream flow right is subordinate to (1) the sum of all
44 water rights recognized under state law with a priority date
45 before the effective date of this Compact, plus any future
46 consumptive use rights calculated according to Article II of this
47 Compact until the limit on future consumptive use set forth in
48 the table below is reached; (2) any use considered
49 non-consumptive as defined by this Compact; (3) any use for
50 instream stockwatering or for stockwater or domestic uses by
51 wells or developed springs with an appropriation of 35 gpm or

less that does not exceed 10 afy; and (4) any use of groundwater not included in the calculation of consumptive use according to Article II of this Compact.

TABLE 2

State Law Based
Total Future Consumptive Use Rights (cfs)
Tributary to the Reserved Portion of Category 3 Streams

Dry Head	Deadman	Davis	Layout
2.23*	1.59**	0.50	0.11

* Or the amount of net depletions reasonably necessary to irrigate 20 acres, whichever is largest.

** Or the amount of net depletions reasonably necessary to irrigate 35 acres, whichever is largest.

c. Category 4:

i. Identification: The following streams are designated as "Category 4": Pete's Canyon Creek, the tributary of Deadman Creek that issues from Annerer Spring and flows across BCNRA land in the N1/2NW1/4 Sec. 8, T8S, R29E, M.P.M.

(1) The United States has a water right for instream flow on Pete's Canyon Creek in the amount of one-half (1/2) of the naturally occurring flow that originates from Pete's Spring.

(2) The United States has a water right for the tributary of Deadman Creek, in the amount of one (1) gallon per minute.

4. Springs

The United States has a water right for instream flows for the following springs identified by location, in the amount of the entire flow of the springs, less any consumptive use rights of the United States described by this Compact.

Sorenson Spring	Sec. 09, T9S, R28E
Lockhart #1 Spring	Sec. 13, T8S, R28E
Lockhart #2 Spring	Sec. 13, T8S, R28E
Hillsboro Spring	Sec. 36, T8S, R28E

This list of springs may be modified based on field verification of any spring located entirely within the boundaries of the BCNRA

that is not the source of a water right recognized under state law. Springs that occur on Crow Reservation lands are excluded from any water rights for springs.

B. Little Bighorn National Battlefield

1. Priority Date

a. The United States has a priority date of December 7, 1886 for current and future consumptive uses under the water rights reserved for the irrigation, maintenance and administration of the Little Bighorn Battlefield National Monument. The United States recognizes that its water rights for the BCNRA are junior in priority to Crow Tribal Water Rights.

b. The United States has a priority date of March 22, 1946 for the instream flow water rights reserved for use as part of the Little Bighorn Battlefield National Monument, and necessary for historical interpretation of the battle. The United States recognizes that its water rights for the LBBNM are junior in priority to Crow Tribal Water Rights.

2. Consumptive Use

a. The United States has a reserved water right for current and future consumptive uses for the purposes of LBBNM as set forth in Table 3. The period of use shall be from January 1 through December 31. The place of use or point of diversion of a consumptive use water right at LBBNM shall include any non-reserved land within LBBNM boundaries as the boundaries exist on the effective date of this Compact.

TABLE 3

United States National Park Service
Little Bighorn National Battlefield Consumptive Use

Place of Use	Total Volume (ac-ft)	Maximum Flow Rate (gpm)	Source
Cemetery, Visitors Center, Administrative Offices, Residences, Historic Buildings Maintenance Area, and Firehouse Facilities.	84.9	450	ground- water well

1 3. Instream Flow

2
3 The United States has a reserved water right for instream flow on
4 the Little Bighorn River where it forms the boundary of the
5 Little Bighorn Battlefield National Monument as follows:
6

7 a. The United States has a reserved water right for minimum
8 instream flow in the amount of 51.0 cfs with a priority of March
9 22, 1946, for the period January 1 through December 31, provided
10 that, the instream flow water right is subordinate to:
11

12 (1) any water rights recognized under the state law with a
13 priority date before the effective date of this Compact;
14

15 (2) any instream stockwater use;
16

17 (3) any use of groundwater through wells or developed springs
18 with an appropriation of 35 gpm or less that does not exceed 10
19 afy;
20

21 (4) any use considered non-consumptive as defined by this
22 Compact;
23

24 (5) any use of groundwater not included in the calculation of
25 consumptive use according to Article II of this Compact.
26

27 b. The United States has a reserved water right for instream
28 flow in the amount of 950 cfs, with a priority date of March 22,
29 1946, for 15 days during the period of May 1st through June 30th,
30 subject to the terms and conditions regarding implementation as
31 set forth in Article II, section K, provided that, the instream
32 flow water right is subordinate to:
33

34 (1) any water rights recognized under the state law with a
35 priority date before the effective date of this Compact;
36

37 (2) any instream stockwater use;
38

39 (3) any use of ground water from wells completed outside of the
40 Quaternary Alluvium or Quaternary Terrace Deposits of the Little
41 Bighorn River and its tributaries or the Parkman Sandstone;
42

43 (4) any use of groundwater from wells or developed springs
44 completed in the Quaternary Alluvium, Quaternary Terrace
45 Deposits, or the Parkman Sandstone with an appropriation of 35
46 gpm or less that does not exceed 10 afy;
47

48 (5) any use of groundwater from wells completed in the Quaternary
49 Alluvium, Quaternary Terrace Deposits, or the Parkman Sandstone
50 with a permit amount in excess of 35 gpm or 10 afy that is not
51 determined to be hydrologically connected to the Little Bighorn

1 River or its tributaries pursuant to Article II. section
2 B.2.b.iii. of this Compact;

3
4 (6) any use considered non-consumptive as defined by this
5 Compact.

6
7 c. Instream Flow Rights Not Cumulative: The 950 cfs instream
8 flow, when it occurs, is not additive to the 51.0 cfs year-round
9 minimum flow.

10
11 C. Emergency Fire Suppression

12
13 The use of water for emergency fire suppression benefits the
14 public, and is necessary for the purposes of the various Park
15 reservations. The United States, may as part of its reserved
16 water right, divert water for fire suppression at all of the
17 National Park Service Units as needed, and without a definition
18 of the specific elements of a recordable water right. Use of
19 water for fire suppression shall not be deemed an exercise of the
20 United States' reserved water rights for consumptive use or a
21 violation of its reserved water rights for instream flow.
22

23
24 ARTICLE IV

25
26 [NO PROVISIONS]

27
28
29 ARTICLE V
30 GENERAL PROVISIONS

31
32 A. No Effect on Tribal Rights or Other Federal Reserved Water
33 Rights:

34
35 1. Nothing in this Compact may be construed or interpreted in
36 any manner to establish the nature or extent of the rights to
37 water or the right to administer water of an Indian Tribe in
38 Montana, or of a water right of an individual that is derivative
39 of such right, or of the United States on behalf of such tribe or
40 tribal member. The relationship between the water rights of the
41 National Park Service described herein and any rights to water of
42 an Indian Tribe in Montana, or of a water right of an individual
43 that is derivative of such right, or of the United States on
44 behalf of such tribe or tribal member shall be determined by the
45 rule of priority. The United States specifically recognizes the
46 seniority of the Crow Tribal Water Rights.
47

48 2. Nothing in this Compact is otherwise intended to conflict
49 with or abrogate a right or claim of an Indian Tribe regarding
50 boundaries or property interests in the State of Montana.
51

1 3. Nothing in this Compact may be construed or interpreted in
2 any manner to establish the nature, extent or manner of
3 administration of the rights to water of any other federal agency
4 or federal lands in Montana other than those of the National Park
5 Service. The exercise of a water right of the United States, if
6 any, to water for a consumptive use on land administered by the
7 United States Forest Service upstream of a water right to
8 instream flow described in this Compact shall be allocated from
9 the United States' share for instream flow, not the state's share
10 for consumptive use.

11
12 B. State Water Rights
13

14 Nothing in this Compact may limit the exclusive authority of the
15 state, including the authority of a water commissioner authorized
16 by state law, to administer all current and future water rights
17 recognized under state law within and upstream of the reserved
18 land covered by this Compact, provided that in administration of
19 those water rights in which the United States has an interest,
20 such authority is limited to that granted under federal law.

21
22 C. General Disclaimers
23

24 Nothing in this Compact may be construed or interpreted:
25

26 1. as a precedent for the litigation or the interpretation or
27 administration of future compacts between the United States and
28 the state; or of the United States and any other state;
29

30 2. as a waiver by the United States of its right under state
31 law to raise objections in state court to individual water rights
32 claimed pursuant to the state Water Use Act, Title 85, of the
33 Montana Code Annotated, in the basins affected by this Compact;
34

35 3. as a waiver by the United States of its right to seek relief
36 from a conflicting water use not entitled to protection under the
37 terms of this Compact;
38

39 4. to establish a precedent for other agreements between the
40 state and the United States or an Indian tribe;
41

42 5. to determine the relative rights, inter sese, of persons
43 using water under the authority of state law or to limit the
44 rights of the parties or a person to litigate an issue not
45 resolved by this Compact;
46

47 6. to create or deny substantive rights through headings or
48 captions used in this Compact;
49

1 7. to expand or restrict any waiver of sovereign immunity
2 existing pursuant to federal law as of the effective date of this
3 Compact;

4
5 8. to affect the right of the state to seek fees or
6 reimbursement for costs or the right of the United States to
7 contest the imposition of such fees or costs, pursuant to a
8 ruling by a state or federal court of competent jurisdiction or
9 Act of Congress;

10
11 9. to affect in any manner the entitlement to or quantification
12 of other federal water rights. This Compact is only binding on
13 the United States with regard to the water rights of the National
14 Park Service, and does not affect the water rights of any other
15 federal agency.

16
17 10. to alter or amend any provisions of the Yellowstone River
18 Compact, Act of October 30, 1951, ch. 629, 65 Stat. 663 (1951).

19
20 D. Use of Water Right

21
22 Except as otherwise provided in this Compact, the rights of the
23 United States described in this agreement are federal reserved
24 water rights. Non-use of all or a part of the federal reserved
25 water rights described in this Compact shall not constitute
26 abandonment of the right. The federal reserved water rights
27 described in this Compact need not be applied to a use deemed
28 beneficial under state law, but shall be restricted to uses
29 necessary to fulfill the purposes of the associated reserved
30 land.

31
32 E. Appropriation Pursuant to State Law

33
34 Nothing in this Compact may prevent the United States from
35 seeking a permit to appropriate water under state law for use
36 outside the boundaries of the federal reservations for which a
37 water right is described in this Compact, provided that, no such
38 use may be included in the calculation of total current or future
39 consumptive use rights allocated to use pursuant to state law by
40 this Compact, and provided further that, a water right obtained
41 in this manner shall be considered a state water right and shall
42 be administered pursuant to general provisions of state law as
43 provided in Article II, section J.2.b.

44
45 F. Reservation of Rights

46
47 The parties expressly reserve all rights not granted, described
48 or relinquished in this Compact.

49
50 G. Severability
51

1 The provisions of this Compact are not severable, provided that
2 for the purposes of Sec. 85-2-702(3) MCA, the water rights
3 described in this Compact for the LBBNM and BCNRA Units shall be
4 considered as separate Compacts.
5

6 H. Multiple Originals
7

8 This Compact is executed in quintuplicate. Each of the five (5)
9 Compacts bearing original signatures shall be deemed an original.
10

11 I. Notice
12

13 Unless otherwise specifically provided for in this Compact,
14 service of notice required hereunder, except service in
15 litigation, shall be:
16

17 1. State: Upon the Director of the Department and such other
18 officials as he or she may designate in writing.
19

20 2. United States: Upon the Secretary of the Interior and such
21 other officials as he or she may designate in writing.
22

23 ARTICLE VI
24 FINALITY OF COMPACT AND DISMISSAL OF PENDING CASES
25

26 A. Binding Effect
27

28 1. The effective date of this Compact is the date of the
29 ratification of this Compact by the Montana legislature, written
30 approval by the United States Department of the Interior, or
31 written approval by the United States Department of Justice,
32 whichever occurs later. Once effective, all of the provisions of
33 this Compact shall be binding on:
34

35 a. The state and a person or entity of any nature whatsoever
36 using, claiming or in any manner asserting a right under the
37 authority of the state to the use of water; and
38

39 b. except as otherwise provided in Article V, section A., the
40 United States, a person or entity of any nature whatsoever using,
41 claiming, or in any manner asserting a right under the authority
42 of the United States to the use of water.
43

44 2. Following the effective date, this Compact shall not be
45 modified without the consent of both parties. Either party may
46 seek enforcement of this Compact in a court of competent
47 jurisdiction. Attempt to unilaterally modify this Compact by
48 either party shall render this Compact voidable at the election
49 of the other party.
50

1 3. On approval of this Compact by a state or federal court of
2 competent jurisdiction and entry of a decree by such court
3 confirming the rights described herein, this Compact and such
4 rights are binding on all persons bound by the final order of the
5 court.

6
7 4. If an objection to this Compact is sustained pursuant to
8 85-2-702(3), MCA, this Compact shall be voidable by action of and
9 without prejudice to either party.

10
11 B. Disposition of Actions
12

13 Subject to the following stipulations and within one hundred
14 eighty (180) days of the effective date, the parties shall submit
15 this Compact to an appropriate state court or courts having
16 jurisdiction over this matter in an action commenced pursuant to
17 43 U.S.C. § 666, for approval in accordance with state law and
18 for the incorporation of the reserved water rights described in
19 this Compact into a decree or decrees entered therein. The
20 parties understand and agree that the submission of this Compact
21 to a state court or courts, as provided for in this Compact, is
22 solely to comply with the provisions of 85-2-702(3), MCA, and
23 does not expand the jurisdiction of the state court or expand in
24 any manner the limited waiver or sovereign immunity of the United
25 States in the McCarran Amendment, 43 U.S.C. § 666 or other
26 provision of federal law.
27

28 1. Dismissal of Filed Claims: At the time the state courts
29 approve the reserved water rights described in this Compact and
30 enter a decree or decrees confirming the rights described herein,
31 such courts shall dismiss, with prejudice, all of the water right
32 claims specified in Appendix 3 to this Compact. If this Compact
33 fails approval or a reserved water right described herein is not
34 confirmed, the specified claims shall not be dismissed.
35

36 2. Disposition of Federal Suits: Within ninety (90) days of
37 the issuance of a final decree or decrees by the state courts
38 approving this Compact and confirming the reserved water rights
39 described herein, and the completion of any direct appeals
40 therefrom or the expiration of the time for filing such appeal,
41 the parties shall execute and file joint motions pursuant to Rule
42 41(a) Fed. R. Civ. P. to dismiss with prejudice any claims made
43 by the United States for LBBNM or BCNRA in federal court. This
44 Compact may be filed as a consent decree in those federal suits,
45 only if, prior to the dismissal of the federal suits as provided
46 in this Article, it is finally determined in a judgment binding
47 on the State of Montana that the state courts lack jurisdiction
48 over some or all of the reserved water rights described in this
49 Compact. Within one year of such judgment the United States
50 agrees to commence such additional proceedings in the federal
51 district court for the District of Montana as may be necessary to

1 judicially confirm the reserved water rights described herein
2 which are not included within an existing action.

3
4 C. Settlement of Claims

5
6 The parties intend that, with the exceptions noted herein, the
7 water rights described in this Compact are in full and final
8 settlement of the water right claims for the reserved land
9 administered by the National Park Service in Montana on the
10 effective date of this Compact. Pursuant to this settlement, by
11 which certain federal reserved water rights are expressly
12 recognized by the state in this Compact and other water rights
13 claims of the United States are expressly retained in Article
14 III, sections D. and F. in the Compact for YNP, GNP and BHNM, the
15 United States hereby and in full settlement of any and all claims
16 filed by the United States or which could have been filed by the
17 United States for reserved land administered by the National Park
18 Service in Montana relinquishes forever all said claims on the
19 effective date of this Compact to water within the State of
20 Montana for reserved land administered by the National Park
21 Service. The state agrees to recognize the reserved water rights
22 described and quantified herein, and shall, except as expressly
23 provided for herein, treat them in the same manner as a water
24 right recognized by the state.

25
26 Specifically excepted from this final settlement of water rights
27 are water rights Claims No. 43P-W-162354-00 and 43P-W-162348-00,
28 both of which are claimed in the general adjudication of water
29 rights as state law based water rights. Claim No.
30 43P-W-162354-00 is for 0.75 cfs from the Big Horn Canal for
31 irrigation purposes at the Bighorn River Ranch site within BCNRA.
32 Claim No. 43P-W-162348-00 is for 50 gpm from Pete's Spring for
33 recreation and wildlife purposes and is located outside of the
34 BCNRA boundary.

35
36 D. The parties agree to defend the provisions and purposes of
37 this Compact from all challenges and attacks.

38
39
40 IN WITNESS WHEREOF the representatives of the State of Montana
41 and the United States have signed this Compact on the ____ day
42 of _____, 19__.

43
44
45
46
47 FOR THE STATE OF MONTANA

48
49
50
51 _____
Marc Racicot, Governor

IN WITNESS WHEREOF the representatives of the State of Montana have signed this Compact on the 16th day of December, 1994.

**FOR THE STATE OF MONTANA
MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION**



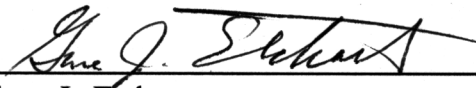
Chris D. Tweeten, Chairman



Tara DePuy



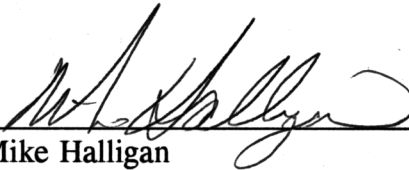
Emily Swanson



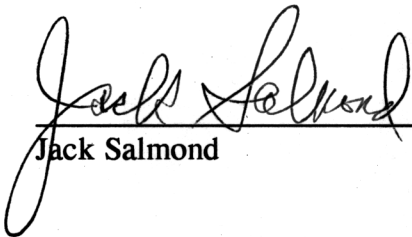
Gene J. Etchart



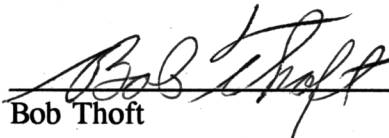
Lorents Grosfield



Mike Halligan



Jack Salmond



Bob Thoft



Bob Gilbert

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FOR THE UNITED STATES OF AMERICA

The Department of the Interior

The Department of Justice
